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GIFFORD, KRASS, GROH, SPRINKLE & CITKOWSKI, P.C			JACKSON, ANDRE L	
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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/748,910
Filing Date: December 22, 2003
Appellant(s): HERRMANN, THOMAS

John G. Posa
(# 37,424)
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed December 5, 2005 appealing from the Office action mailed July 27, 2005.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

USPN 6,182,334	Davancens	2-2001
USPN 2,704,961	Weil	3-1955

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

Claims 1-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over USPN 6,182,334 to Davancens in view of USPN 2,704,961 to Weil. Davancens discloses an end fastener (12) for use with a pair of eyeglasses (14) having manually operated, elongated temple legs (16), the end fastener comprising;

a sleeve (34) of pliable material having an open end, a closed end (32), an internal length and a cylindrical internal cross-sectional dimension and a wall thickness; and wherein the internal length appears to be in the order of 2.5 cm or less and the internal cross-sectional dimension appears to be in the order of 1 cm or less (Figs. 2 & 3) and the wall thickness, including the closed end is of a dimension, however, Davancens does not specifically disclose the specific measurements as claimed. Weil teaches a support for a pair of eyeglasses comprising a sleeve (14) of pliable material having an open end (15) and an opposite closed end. The sleeve further defines an internal length and a cylindrical internal cross-sectional dimension and a uniform wall thickness from the open end to the closed end as seen in Fig. 4. The sleeve is designed as such to ensure frictional engagement to prevent separation or loss from the pair of

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eyeglass arms (12). Moreover, Weil teaches modification of the support to connect with eyeglasses having a various styles, shapes and sizes. Therefore, it would have been obvious to one having ordinary skill in the art at the time of applicant's invention to modify the end fastener of Davancens to incorporate the support as taught by Weil, to provide a resilient end fastener designed to ensure frictional engagement to prevent separation or loss from a pair of eyeglass having a various styles, shapes and sizes.

Regarding claim 2, although Davancens discloses that the internal cross-section is circular, it would be obvious to one of ordinary skill in the art that this shape can be rectangular as well to be received onto temple legs that are substantially rectangular in shape, thus providing an end fastener adaptable to fit onto various shapes of temple legs with a secure grip.

As to claims 4-6, 9 and 12, Davancens discloses that the end fastener is composed of a outer body or overlay (30) with an internal core or liner (38). The pliable material of the end fastener is an elastomeric material having a hardness value within the claimed range (col. 5, lines 25-27).

As to claims 7, 8, 10, 11 and 13-15, Davancens in view of Weil does not disclose the specific measurements of the end fastener and support as claimed. It has been held that discovering an optimum value of a result effective variable involves only routine skill in the art.

In re Boesch, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

(10) Response to Argument

Appellant's remarks filed in the Appeal's Brief of December 5, 2005 have been considered but determined not to be persuasive.

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At the outset, the Examiner notes appellant is silent with regards to the specific dimensions of appellant's cover as recited in claim 1, in particular, the recited length, cross-sectional dimension and wall thickness of the cover as claimed. Here, the Examiner can only assume that appellant realizes that the prior art of record and the prior art references used in the Final Rejection of July 27, 2005 can be considered a cover or sleeve and more importantly, obvious to appellant and one of ordinary skill in the art to have small dimensional relationships similar to appellant's claimed invention. Turning to appellant's arguments that are made in reference to claim 1, appellant states that the prior art relied upon (Davancens and Weil) fail to disclose a cover or sleeve having a closed end where the a wall thickness of the sleeve, including the closed end is substantially consistent. Moreover, appellant states Davancens teaches away from a substantially consistent wall thickness, and that Weil does not include a closed end, thus there is no teaching or suggestion to combine these references. Simply that there are differences between two references is insufficient to establish that such references "teach away" from any combination thereof. *In re Beattie*, 974 F.2d 1309, 1312-13, 24 USPQ2d 1040, 1042 (Fed. Cir. 1992).

Furthermore, taking a closer look and both Davancens and appellant's claimed limitations, Davancens as evidenced by figures 3 and 6, show similar embodiments of an end fastener including an open end **34** defined by a core **38**, an opposite closed end of the fastener body **30**, **54** and a base member **32**, **62**. As seen, the closed end of Davancens' end fastener is integral with the base, which extends from the closed end of the body to a free end.

It is further seen that the closed end of the body is defined by the step or taper point (shoulder) where the closed end and an end of the base member are interconnected. The cross-sectional views of figures 3 and 6 also show a wall thickness of the body. This wall thickness, including

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the closed end is substantially consistent as shown. Likewise, taking a closer at Weil and appellant's claimed limitations of claim 1, the Examiner disagrees with appellant and refers to a cross-sectional view of Weil's spectacle support illustrated in figure 4. Figure 4 exemplifies a sleeve 14 including an open end 15 and an oppositely disposed crown shaped closed end defining a substantially consistently formed wall thickness. Although the crown shape closed end undoubtedly includes a small opening for a tether or cord 13, this small opening does not automatically remove the sleeve of Weil from not defining a closed end. Even further, Weil illustrates different embodiment of the attachment of the tether or cord relative to the close end as seen in figures 9-12 and it is well known within the art of known molding, welding or extruding techniques that could be used to form the closed end of the sleeve of Weil to encompass the tether or cord without any opening within the closed end. Therefore, the Examiner believes appellant's claim limitations as argued relative to claim 1 is made obvious by both Davancens and Weil.

As to appellant's remarks pertaining to claim 3 that neither Davancens nor Weil disclose or suggest a rectangular cross-section of the sleeve as claimed is found not to be persuasive. Here, both Davancens and Weil's prior art inventions include a sleeve made of a flexible plastic material, in particular, an elastomer or rubber material. It is well known within the art that one of the properties or characteristics of such material is the "springy" or "shape memory" property of an elastomer or rubber.

As shown in figure 1, of Weil, the sleeve(s) is engaged upon the end of the leg(s) 12 of a pair of spectacles.

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The shape of the leg(s) define a rectangular cross-section and the shape of the inner bore of the sleeve(s) of Weil illustrates a rectangular cross-section when assembled upon a respective leg as displayed in figure 1. Thus, the Examiner believes appellant's arguments relating to claim 3 is made obvious over Weil.

As to appellant remarks pertaining to claims 4, 9 and 12, that Davancens and Weil fail to disclose or suggest the structural limitation of a sleeve formed of a pliable material is composed of a co-extensive liner and overlay. Here, the Examiner interprets the hollow core **38** and the body **30** of Davancens' end fastener to an integrally formed liner and overlay, where the interior surface bounding the hollow core as broadly interpreted is considered a liner, since a broad definition of a liner, as evidenced by Merriam-Webster's Dictionary, is a part (a) serving as the lining of or (b) to put something in the inside of. Therefore, the interior surface bounding the hollow core serves as the interior lining of the body and made to put something (eyeglass leg) in the inside of. If one was to consider a co-extensive liner and overlay to define a structural arrangement of a co-extensive liner and overlay as separate components, Weil illustrates a co-extensive liner and overlay in figures 5 and 5A. Here, the sleeve **14a** has an end thereof overlayed by a cap **32**, which the Examiner interprets as a sleeve of pliable material composed of a co-extensive liner and overlay. Thus, the Examiner believes appellant's arguments relating to the above claims are made obvious over Davancens and Weil.

Next, appellant arguments relating to claims 7, 8, 11, 14 and 15 that neither Davancens nor Weil disclose the certain measurements claimed is found not to be persuasive. The certain range of measurements set forth in the above claims would have been obvious to one having ordinary skill in the art at the time of appellant's invention was made to form the cover or sleeve

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members of Davancens and/or Weil to be within certain measurements to provide an optimum level of cushion and comfort for a user's ears once the end fastener or spectacle support of Davancens or Weil respectively is assembled. Additionally, providing an optimum level of function for the intended use, where the resilient end fastener or spectacle support is designed to ensure frictional engagement to prevent separation or loss from a pair of eyeglass leg members having various styles, shapes and sizes. Supplementary, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art and furthermore, the Examiner is unable to find in appellant's specification any measurement deemed critical to success of appellant's invention or a new or unexpected result is achieved and the measurements of the end fastener or spectacle support of Davancens and Weil operate equally as well. Therefore, the Examiner believes appellant's remarks relating to the above claims are made obvious over Davancens and Weil.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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